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No. 94-238

In The

Supreme Court of the United States

October Term, 1994

SISTERS OF THE HOLY FAMILY OF NAZARETH,
A TEXAS CORPORATION,

Petitioner,

v.

CITY OF GRAND PRAIRIE, TEXAS,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Texas

BRIEF IN OPPOSITION FOR RESPONDENT CITY OF GRAND PRAIRIE, TEXAS

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COUNTER STATEMENT OF QUESTIONS PRESENTED

Whether this Court has jurisdiction under 28 U.S.C. § 1257 to issue a petition for writ of certiorari to the highest court of a state that refuses to exercise discretionary jurisdiction to review the judgment and opinion of an intermediate state appellate court?

Whether a taxpayer who successfully challenges a tax assessment ordinance under state law may recover attorneys' fees under 42 U.S.C. § 1988(b) absent proof of a federal constitutional violation?

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No. 94-238

In The

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October Term, 1994

SISTERS OF THE HOLY FAMILY OF NAZARETH, A TEXAS CORPORATION,

Petitioner,

v.

CITY OF GRAND PRAIRIE, TEXAS,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Texas

BRIEF IN OPPOSITION FOR RESPONDENT CITY OF GRAND PRAIRIE, TEXAS

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Respondent, the City of Grand Prairie, Texas (the "City" or "Respondent") respectfully requests that this Court deny the Petition for Writ of Certiorari to the Supreme Court of Texas (the "Petition") filed by the Sisters of the Holy Family of Nazareth ("Sisters" or "Petitioner").

Sisters' Petition should be denied because: (1) the Texas Supreme Court's May 11, 1994 order denying Sisters' application for writ of error is not a judgment

reviewable by this Court under 28 U.S.C. § 1257; (2) there is no conflict between the October 21, 1993 judgment of the Dallas Court of Appeals in this case and any decision of this Court or any other court; and (3) there is no issue of national importance involved in this case.

OPINIONS BELOW

In its original opinion and judgment, the Court of Appeals for the Fifth District of Texas at Dallas, Texas, affirmed the judgment of the 134th District Court of Dallas County, Texas, invalidating certain ordinances passed by the City assessing Sisters for benefits received from paving and drainage improvements and awarding Sisters $63,768.00 in attorneys' fees under 42 U.S.C. § 1988. *See City of Grand Prairie v. Sisters of the Holy Family of Nazareth*, No. 05-92-01962-CV, 1993 WL 290840 (Tex. App. – Dallas July 27, 1993, n.w.h.) (not designated for publication).

The City moved for rehearing, and on October 21, 1993, the court of appeals vacated its earlier judgment and issued a new judgment and opinion, which is reported at 868 S.W.2d 835 (Tex. App. – Dallas 1993, writ denied). On rehearing, the court of appeals concluded that Sisters – having successfully pursued a predeprivation remedy under state law – did not meet its burden to show an unconstitutional taking or deprivation of property in violation of the Fifth and Fourteenth Amendments to the United States Constitution. Because Sisters did not show any violation of its federal constitutional rights, the court of appeals reversed the portion of the trial court's

judgment awarding Sisters attorneys' fees under 42 U.S.C. § 1988.

Sisters filed an application for writ of error seeking review by the Texas Supreme Court. On May 11, 1994, the Texas Supreme Court refused to exercise its discretionary jurisdiction and denied Sisters' application with the notation "writ denied."[1] Sisters now asks this Court to issue a writ of certiorari to the Supreme Court of Texas. *See* Petition for Writ of Certiorari ("Petition") at 1.

RESPONSE TO SISTERS' STATEMENT REGARDING JURISDICTION

Sisters asserts that this Court has jurisdiction to issue a petition for writ of certiorari to the Supreme Court of Texas under 28 U.S.C. § 1257, which provides for this Court's discretionary review of final judgments or decrees "rendered by the highest court of a State in which a decision could be had." 28 U.S.C. § 1257(a).

However, if a state supreme court refuses to exercise its discretionary jurisdiction to hear a case (as the Texas Supreme Court has done in this case), the judgment of the court of appeals (not the state supreme court's order refusing to hear the case) is the judgment reviewable under Section 1257. *See Interstate Circuit, Inc. v. City of Dallas*, 88 S.Ct. 1298, 1300 n.1 (1968) (noting that the

[1] The docket notation "writ denied" signifies that the Texas Supreme Court is of the opinion that the application presents no error of law which requires reversal or which is of such importance of the jurisprudence of the state as to require correction. *See* Tex. R. App. P. 133(a).

"Texas Supreme Court denied discretionary review and therefore the appeal is from the judgment of the [court of appeals]" under Section 1257); *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 74 S.Ct. 396, 397 (1954) (Texas Supreme Court had "refused" petitioner's application for writ of error; thus, appeal was properly from the decision of the court of appeals, not the supreme court).[2] *See also American Ry. Express Co. v. Levee*, 44 S.Ct. 11, 12 (1923) (construing analogous discretionary review powers of Louisiana Supreme Court and holding that, when supreme court declined to exercise discretionary jurisdiction, the court of appeals was "the highest court of the State in which a decision could be had" within the meaning of Section 1257); Stern, Gressman and Shapiro, *Supreme Court Practice* (6th ed.) at § 3.16-.17 ("An order of a court of last resort declining to review a case is not ordinarily the judgment which is reviewable under § 1257; in that event, the reviewable judgment is that of the highest court possessing *and exercising* jurisdiction.") (emphasis added) (citations omitted).[3]

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[2] In *Calvert*, this Court construed the language in Section 1257 providing for an appeal from the *"highest court of a State in which a decision could be had"* in resolving the jurisdictional issue. *See* 74 S.Ct. at 397 (emphasis added). Although *Calvert* and *Interstate Circuit, Inc.* were decided before the 1988 amendments to Section 1257 eliminating the provisions for mandatory appeal to this Court, the emphasized language remains in the current version of Section 1257 providing for this Court's review of state court decisions by petition for writ of certiorari.

[3] To be distinguished are cases involving the highest court of a state's dismissal *of an appeal of right* in which the higher court's dismissal may be considered to be a decision on the merits of the case, or equivalent to an affirmance of the

Moreover, this Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment. *See Coleman v. Thompson*, 111 S.Ct. 2546, 2553-54 (1991). As the Court stated in *Coleman*, the "independent and adequate state law ground" doctrine is jurisdictional. *Id.* at 2554. "Because this Court has no power to review a state law determination that is sufficient to support the judgment, resolution of any independent federal ground for the decision could not affect the judgment and would therefore be advisory." *Id.* As discussed below, the judgment in this case is based upon state law grounds and does not warrant this Court's review.

Based upon these authorities and as required by Supreme Court Rule 15.4, the City objects to this Court's jurisdiction to grant a writ of certiorari to the Supreme Court of Texas as requested in Sisters' Petition.

STATUTES AND RULES INVOLVED

Portions of the relevant constitutional provisions, statutes, ordinances and regulations are set forth in Sisters' Petition. *See* Petition at 2-5. In the interest of brevity,

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appellate court's decision. *See, e.g., R.J. Reynolds Tobacco Co. v. Durham County*, 107 S.Ct. 499, 505-06 (1986); *Matthews v. Huwe*, 46 S.Ct. 108, 108-09 (1925). In contrast, in this case, the Texas Supreme Court's denial of Sisters' application for writ of error represents that Court's decision not to exercise its discretionary jurisdiction and does not in any way constitute an opinion on the merits of the case.

the City will not restate these provisions. Sup. Ct. Rule 24.2.

STATEMENT OF THE CASE

Although Sisters' statement of the case is generally correct, *see* Petition at 6-7, Sisters omits certain significant facts upon which the Dallas Court of Appeals relied in rendering its October 21, 1993 opinion and judgment. Accordingly, the City offers the following supplement to Sisters' statement of the case. Sup. Ct. R. 24.2.

Sisters fails to mention in its Petition the numerous procedural safeguards provided by article 1105b § 9 of the Texas Revised Civil Statutes ("article 1105b"). Specifically, article 1105b provides that the tax assessment is limited to the amount of benefit conferred on the property assessed; that notice and opportunity for a hearing be provided before any assessment is levied; and that a property owner has the right to withhold payment and contest the assessment in a state district court. The taxpayer is not, as Sisters suggests, relegated to seeking post-deprivation relief, nor is the taxpayer forced to pay the assessment under protest.

Indeed, it is undisputed that Sisters was never required to pay any amount of the assessment levied against it and that the lien imposed on its property has been removed as a result of its successful challenge to the assessment ordinance in Texas state court. Moreover, Sisters was not harmed by any lien because it had no intention of selling its property in the near future. Sisters has achieved all of the relief it sought through its pursuit of

state law proceedings. In this respect, Sisters is a "Petitioner" in name only – its attorneys are the only ones dissatisfied with the remedy provided by the Texas state courts.

REASONS FOR DENYING THE WRIT

The court of appeals' opinion in this case is completely consistent with this Court's holdings that predeprivation review, such as the procedure provided by article 1105b for judicial review prior to payment of the assessment, constitutes a procedural safeguard sufficient by itself to satisfy the requirements of both the Fifth and Fourteenth Amendments. *See McKesson v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 110 S.Ct. 2238 (1990); *Williamson Co. Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 195, 105 S.Ct. 3108, 3121 (1985). There is no conflict between the court of appeals' opinion in this case and any opinion of this Court or any other court.

Nor does this case involve any issues affecting federal law. Simply stated, this case is a dispute over attorneys' fees. Sisters successfully pursued its rights under state law, but article 1105b does not provide for an award of attorneys' fees. The Dallas court of appeals properly concluded that Sisters did not suffer a federal constitutional injury; accordingly, Sisters could not "prevail" on its claim under 42 U.S.C. § 1983 and therefore was not entitled to recover attorneys' fees under Section 1988(b). The decision in this case is based solely upon Texas law and Sisters' failure to meet its burden to show a federal

constitutional injury. This Court's exercise of jurisdiction is not warranted.

A. Sisters improperly relies upon cases that do not involve adequate *pre-deprivation* remedies.

As this Court has recognized, due process concerns are satisfied if a state provides a form of " 'predeprivation process,' for example by authorizing taxpayers to bring suit to enjoin imposition of a tax prior to its payment, or by allowing taxpayers to withhold payment and the interpose their objections as defenses in a tax enforcement proceeding initiated by the State," so long as the taxpayer is "given an opportunity for a hearing *before* he is deprived of any significant property interest." *McKesson v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 110 S.Ct. 2238, 2250 (1990) (emphasis in original). As the Dallas Court of Appeals properly concluded in this case, article 1105b meets all of this Court's requirements and satisfies the commands of the Due Process Clause.

Sisters' selective quotation from *McKesson* is misleading. Petition at 9. However, a careful review of the language quoted in Sisters' petition makes it clear that Sisters is not in the same position as the taxpayer in *McKesson*, who was required to pay taxes first and then obtain review of the tax's validity in a refund action. In contrast, under article 1105b, Sisters was allowed to – and did – withhold payment pending review of the validity of the assessment. Sisters did not suffer a taking of its property without due process of law.

Sisters' reliance upon *Albright v. Oliver*, 114 S.Ct. 807 (1994) and *Parratt v. Taylor*, 451 U.S. 527 (1981), Petition at 10-13, is similarly misplaced. *Albright*, in fact, did not even involve any alleged procedural due process violations, and this Court affirmed the lower court's ruling that the petitioner failed to show any federal constitutional violation to support his claim under Section 1983. *Albright*, 114 S.Ct. at 812-13. In *Parratt*, this Court held that the deprivation of property in that case did not violate the due process clause because it resulted from the unauthorized act of a state employee rather than an established state procedure. 451 U.S. at 539-43, 101 S.Ct. at 1915-16. The Court further noted in *Parratt* that state law provided an adequate remedy for the alleged loss. *Id.* at 543, 101 S.Ct. at 1915-16. In this case, there has been no federal constitutional violation, and Sisters has successfully prevailed on its remedy under state law.

B. Invalidity of the assessment ordinance does not automatically entitle Sisters to recover attorneys' fees.

The court of appeals properly concluded that the trial court's finding that the assessment ordinance was invalid does not automatically entitle Sisters to recover attorneys' fees based on its claim under 42 U.S.C. § 1983 ("Section 1983"). 868 S.W.2d at 843. The only question before this Court is whether such a finding – without more – supports an award of attorneys' fees under Section 1988.

Sisters argues that *City of Arlington v. Byrd*, 713 S.W.2d 224 (Tex. App. – Fort Worth 1986, writ ref'd n.r.e.), *cert. denied*, 482 U.S. 929 (1987) supports an award of

attorneys' fees in this case. Petition at 13-14. Although *Byrd* and this case both involve paving assessments by a municipality, the similarities between the two cases end at that point. Indeed, Sisters fails to acknowledge the crucial fact that makes *Byrd* inapplicable under the facts before this Court.

The court of appeals in *Byrd* did not hold that the City of Arlington's actions in that case constituted a violation of Section 1983. Petition at 13. Rather, the trial court in *Byrd* had filed a conclusion of law upholding the taxpayer's contention that the assessment liens filed by the City constituted a taking without just compensation. *Byrd*, 713 S.W.2d at 229. On appeal, the City of Arlington did not challenge this conclusion of law; rather, it challenged only the trial court's authority to include an award of attorneys' fees in the judgment. *Id.* at 228-29; *see also* 868 S.W.2d at 842 n.3 (noting that appellant in *Byrd* did not challenge trial court's conclusion of law regarding "taking").

Thus, given the unchallenged conclusion of law regarding a federal constitutional violation, the only issue before the court of appeals in *Byrd* was whether the trial court had the *authority* to award attorneys' fees under Section 1988 in an action challenging the validity of a special tax assessment. *Id.* The City does not dispute the trial court's *authority* to award attorneys' fees in a proper case. This, however, is not a proper case. The facts of this case and the record before this Court do not support an award of attorneys' fees because no federal constitutional violation occurred. *See City of Waco v. Hester*, 805 S.W.2d 807, 815 (Tex. App. – Waco 1990, writ denied) ("A necessary element in a § 1983 cause of action is proof of a

constitutional violation.") Moreover, the City *did challenge* – successfully – the trial court's erroneous finding on this point. 868 S.W.2d at 842-46. As a result, Sisters' reliance upon *Byrd* is misplaced.

C. Under the record in this case, Sisters has not shown its entitlement to attorneys' fees.

The court of appeals correctly explained in its opinion on rehearing that, in order for Sisters to prevail on its Section 1983 claim, it was required to show that the procedures provided by Tex. Rev. Civ. Stat. Ann. art. 1105b do not meet the due process requirements of the Fifth and Fourteenth Amendments. 868 S.W.2d at 842-43. The court properly determined that, under the facts of this case, Sisters' federal constitutional rights were not violated. 868 S.W.2d at 844-46.

Sisters improperly focuses on the pre-assessment hearing in arguing that it did not receive due process of law. Petition at 15-17. However, the constitutional analysis does not end at that point. When an alleged taking without just compensation has occurred, constitutional requirements are satisfied by a meaningful post-deprivation review. *Williamson County*, 473 U.S. at 195, 105 S.Ct. at 3121. As this Court stated:

> [B]ecause the Constitution does not require pre-taking compensation, and is instead satisfied by a reasonable and adequate provision for obtaining compensation after the taking, the [government action] is not "complete" until the [governmental entity] fails to provide adequate compensation for the taking.

Id. at 195, 105 S.Ct. at 3121. In this case, Sisters had – and successfully pursued – an adequate remedy in state court. *See* Tex. Rev. Civ. Stat. Ann. art. 1105b; 868 S.W.2d at 844-46. Thus, Sisters' complaints regarding the pre-assessment hearings do not end the inquiry.

In thoroughly considering the constitutional sufficiency of the process afforded by article 1105b, the court of appeals noted that article 1105b has several procedural safeguards. 868 S.W.2d at 845. Specifically, section 9 of article 1105b incorporates the constitutional mandate that special tax assessments must be limited to the amount of benefit conferred on the property assessed, requires notice and opportunity for hearing before any assessment is levied, and gives the property owner the right to withhold payment and contest the assessment in state court. The prepayment challenge and right to judicial review are in themselves sufficient to satisfy the Fifth and Fourteenth Amendments. 868 S.W.2d at 845.

Because of the safeguards under article 1105b, any alleged arbitrary assessment by the City does not automatically constitute a federal constitutional injury. 868 S.W.2d at 843. In order to show a violation of its federal constitutional rights, Sisters was required to show that the remedies under article 1105b (the pre-assessment hearings coupled with judicial review applying the substantial evidence rule) did not adequately preserve its right to just compensation and due process of law, thereby making necessary an action under Section 1983. Sisters failed to meet this burden.

Further, Sisters unsuccessfully attempts to distinguish the cases relied upon by the court of appeals in its opinion on rehearing. Petition at 17-19. First, Sisters incorrectly contends that *Williamson County* and *Federal Deposit Ins. Corp. v. City of New Iberia*, 921 F.2d 610 (5th Cir. 1991), do not support the court of appeals' holding that an unconstitutional special assessment does not automatically entitle a plaintiff to recover attorneys' fees under Section 1983. Petition at 17-19 (discussing *Williamson County* and *City of New Iberia*, 921 F.2d at 615). Sisters misses the point in focusing on the "ripeness" issue in *Williamson County*. Petition at 17-18.

As this Court explained in *Williamson County*, there can be no federal constitutional violation (and thus no claim under Section 1983) unless and until: (1) there is a "taking"; and (2) just compensation for that taking has been denied. *Williamson County*, 473 U.S. at 194-95, 105 S.Ct. at 3120-21. "The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation." *Id.* at 194, 105 S.Ct. at 3120. Thus, a "taking" does not in and of itself violate the Fifth Amendment. *Id.* at 194 n.13; 105 S.Ct. at 3120 n.13. Likewise, the finding of an unconstitutional tax assessment, standing alone, does not automatically constitute an injury within the Fifth or Fourteenth Amendment. The first inquiry is whether the process provided under state law (here, the procedural safeguards afforded under article 1105b) is sufficient to satisfy due process concerns. The court of appeals properly concluded that the procedures under article 1105b are constitutionally sufficient.

Sisters' discussion of *City of New Iberia* relates only to whether the assessment ordinance was valid, an issue the court of appeals determined in Sisters' favor in its original opinion and on rehearing. Petition at 18-19; 868 S.W.2d at 840-41. In any event, the Fifth Circuit's recognition in *City of New Iberia* that "local tax assessments [do] not contravene the Fourteenth Amendment unless they amount[ ] to such an abuse to be an outright confiscation of property" does support the court of appeals' conclusion that Sisters is not entitled to recover attorneys' fees simply because the ordinance was found to be invalid. *City of New Iberia*, 921 F.2d at 615 (citations omitted). A specialized assessment later declared invalid through proceedings under article 1105b does not automatically constitute a violation of the Fifth or Fourteenth Amendment to support recovery of attorneys' fees under Section 1988, and Sisters' arguments to the contrary are without merit.

The court of appeals also rejected as meritless Sisters' argument that the imposition of the lien caused a diminution of economic value equal to the amount of the lien. Petition at 19-20; 868 S.W.2d at 846. Although a tax assessment that "immediately and drastically diminishes the value of the [property owner's] interest" may constitute a "taking," the record in this case contains no evidence that the City's lien rendered Sisters' property useless or caused a diminution in economic value. 868 S.W.2d at 846, citing *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 798 103 S.Ct. 2706, 2711 (1983). Indeed, Sisters took advantage of the judicial review procedures in article 1105b and prevailed.

D. Because no federal constitutional violation occurred, there is no basis for an award of attorneys' fees.

The City does not dispute that "[section 1983] is not limited to suits for monetary damages." Petition at 21. However, as the court of appeals correctly noted, Sisters did not seek compensation for the lien's interference. Rather, it only sought attorneys' fees as a "prevailing party" under Section 1983. 868 S.W.2d at 846-47. A party is *not* a prevailing party under Section 1988 if he recovers only on state law claims. *See City of Waco v. Hester*, 805 S.W.2d 807, 817 (Tex. App. – Waco 1990, writ denied) (plaintiff did not prevail on § 1983 claim; judgment reformed to delete recovery of attorneys' fees). *See also Kelly v. City of Leesville*, 897 F.2d 172, 177 (5th Cir. 1990); *McDonald v. Doe*, 748 F.2d 1055, 1057 (5th Cir. 1984) (party must prevail on constitutional claims to recover under Section 1988).

Sisters cites *City of Riverside v. Rivera*, 477 U.S. 561 (1986), in support of its argument that it is entitled to recover attorneys' fees. Petition at 23. In *Rivera*, however, the plaintiffs *had prevailed* in their civil rights action. Consequently, the issue before this Court in *Rivera* was the reasonableness of the attorneys' fee award under Section 1988. In contrast, the question in this case is whether a party who prevails only on a *state law claim* can nevertheless recover attorneys' fees under the federal civil rights statutes. As the authorities cited above hold, and as the court of appeals properly held, attorneys' fees are not recoverable under the facts of this case.

Sisters did not meet its burden to show an unconstitutional taking or deprivation of property without due process of law and, therefore, is not a "prevailing party" under Section 1983. As a result, Sisters is not entitled to recover attorneys' fees under Section 1988(b).

Sisters' argument fails for another independent reason. Section 1988 only authorizes courts to award attorneys' fees "as part of the costs." 42 U.S.C. § 1988. As a result, "when a court denies costs, it must deny fees as well; if there are no costs, there is nothing for the fees to be awarded 'as part of.' " *See Farrar v. Hobby*, 113 S.Ct. 566, 577 (1992) (O'Connor, J., concurring). The judgment in this case orders that each party bear its own costs of the appeal. Thus, even if Sisters has otherwise shown its entitlement to attorneys' fees, Sisters did not recover any "costs" that attorneys' fees could be awarded "as part of."

CONCLUSION

Sisters incorrectly asks this Court to issue a writ of certiorari to the Supreme Court of Texas, and 28 U.S.C. § 1257 does not provide a jurisdictional basis for Sisters' request. Even if Sisters had requested issuance of a writ of certiorari to the proper court – the Dallas Court of Appeals, which rendered the judgment Sisters complains of – Sisters' Petition for a Writ of Certiorari should be denied because the court of appeals' opinion and judgment does not conflict with any decision of this Court or any other court. Moreover, Sisters' Petition presents no issue of national importance. The ordinance at issue has

been declared invalid by the state courts of Texas and the tax lien removed. Nevertheless, Sisters' attorneys attempt to invoke this Court's jurisdiction for their own benefit, even though attorneys' fees are not recoverable under article 1105b, and no federal constitutional violations occurred to support an award of attorneys' fees under 42 U.S.C. § 1988(b).

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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